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Notes and Comments

William F. Zacharias

J. J. Buechell

W. S. Grotefeld

NOTES AND COMMENTS

Judicial Re-examination of Foreign Divorce Decrees

It was to be expected that repercussions of the decision in *Williams* v. *North Carolina*[1] would be felt in the courts dealing with divorce cases. It was not expected, however, that it would so soon produce the varied reaction that has been demonstrated by two recent decisions. In one of them, that of *Stephens* v. *Stephens*,[2] the Illinois Appellate Court for the Second District, one judge dissenting, recently came to the conclusion that a foreign divorce decree that is *prima facie* valid where granted must be accorded full faith and credit in this state.[3] As a consequence, a decree rejecting a defense based on such foreign divorce was reversed since the majority of the reviewing court felt the decision in the Williams case made it mandatory upon the court to give recognition to the foreign decree and the jurisdictional findings therein. In the other, that of *Bowditch* v. *Bowditch*,[4] the Supreme Judicial Court of Massachusetts came to an exactly opposite conclusion and approved the conduct of the trial court in overruling a plea in abatement based upon a decree of divorce granted by another state. The decision in the Williams case was also invoked by the appellant therein, but the court held it did not prevent inquiry into the jurisdictional basis of the foreign decree.[5]

Problems arising from migratory divorces are not new to the courts,[6] but the decision in *Haddock* v. *Haddock*[7] left each state free to settle for itself the validity of the foreign decree so far as its own residents were concerned. On previous occasions the Illinois courts, settling the policy of this state, have recognized such decrees even though based on substituted service, provided the plaintiff was domiciled in a

1 317 U. S. 287, 63 S.Ct. 207, 87 L. Ed. (adv.) 189, 143 A.L.R. 1273 (1942), noted in 31 Calif. L. Rev. 167, 18 Ind. L.J. 165, 7 Md. L. Rev. 29, 41 Mich. L. Rev. 1013, 15 Miss. L.J. 165, 17 St. John's L. Rev. 87, and 52 Yale L.J. 341.

2 319 Ill. App. 292, 49 N.E. (2d) 560 (1943). Dove, J., wrote a dissenting opinion.

3 Plaintiff therein sought annulment on the ground of prior marriage undissolved. Defendant relied on a Nevada divorce. Plaintiff contended the divorce was invalid. Service in the Nevada case was based on publication. The decree itself recited that plaintiff had been a bona fide resident of the state for the requisite period and that the court had jurisdiction of the parties and the subject matter.

4 —Mass.—, 50 N.E. (2d) 65 (1943).

5 Similar holdings appear in the lower courts of New York of which the following are but illustrative: Oberlander v. Oberlander, 39 N.Y.S. (2d) 139 (1943); Jiranek v. Jiranek, 39 N.Y.S. (2d) 523 (1943); In re Bingham's Will, 39 N.Y.S. (2d) 756 (1943); McKee v. McKee, 39 N.Y.S. (2d) 859 (1943); McCarthy v. McCarthy, 39 N.Y.S. (2d) 922 (1943); Schnabel v. Schnabel, 39 N.Y.S. (2d) 972 (1943); Meyers v. Meyers, 40 N.Y.S. (2d) 444 (1943); Reese v. Reese, 40 N.Y.S. (2d) 468 (1943); Standish v. Standish, 40 N.Y.S. (2d) 538 (1943). See also Commonwealth v. Allison, 151 Pa. Super. 369, 30 A. (2d) 365 (1943).

6 In general, see 2 Law and Cont. Prob., pp. 289-400.

7 201 U. S. 562, 26 S.Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906).

bona fide fashion in the state issuing the decree.[8] But our courts, prior to the holding mentioned above, have not felt themselves bound either by the declaration of the other court that it possessed jurisdiction or that the plaintiff's domicile was sufficient to support that fact.[9] Instead, it has been held that inquiry into the facts of the foreign divorce proceeding to determine whether jurisdiction had been properly acquired was highly proper, even though the decree might recite that jurisdiction existed.[10] The decision in the Stephens case, then, represents a clear departure from what had been the announced policy of this state.

Justification for such departure was said to be based entirely on the Williams case,[11] but it is doubtful if such a pronounced change was required thereby. This state would have no quarrel with that part thereof which overruled the Haddock case since, as was pointed out above, this state has given full faith and credit to every foreign divorce decree where the plaintiff was, in fact, a bona fide resident.[12] But beyond overruling the Haddock case, and thereby affecting only those jurisdictions which followed the rule thereof, the United States Supreme Court did not venture to go. The court therein clearly did not touch upon the question as to whether the courts of one state were bound by the declaration of the foreign court that it possessed proper jurisdiction, nor did it say they were prevented from inquiring into the facts to determine whether jurisdiction had been properly acquired.

It should be remembered that the original judgment in the Williams case was based upon a general verdict of a jury which had been charged not only on the issue of domicile but also on the question of the failure of due process because the divorce was based on substituted service. It was on this latter issue that the court predicated error but felt itself obliged to reverse because a general verdict had been taken. Concerning the immediate problem, the court said: ". . . we cannot avoid meeting the Haddock issue in this case by saying that the petitioners acquired no bona fide domicile in Nevada. If the case had been tried and submitted on that issue only we would have quite a different problem . . . We have no occasion to meet that issue now and we intimate no opinion on it."[13] In *Bell* v. *Bell*,[14] however, the court had decided that

8 Rendleman v. Rendleman, 118 Ill. 257, 8 N.E. 773 (1886); Chamblin v. Chamblin, 362 Ill. 588, 1 N.E. (2d) 73 (1936).

9 Dunham v. Dunham, 162 Ill. 589, 44 N.E. 841 (1896), affirming 57 Ill. App. 475 (1895); Field v. Field, 215 Ill. 496, 74 N.E. 443 (1905); Forrest v. Fey, 218 Ill. 165, 75 N.E. 789 (1905); Wynn v. Wynn, 254 Ill. App. 254 (1929); Janssen v. Janssen, 269 Ill. App. 233 (1933), cert. den. 269 Ill. App. xiv; Jardine v. Jardine, 291 Ill. App. 152, 9 N.E. (2d) 645 (1937); Grein v. Grein, 303 Ill. App. 398, 25 N.E. (2d) 409 (1940).

10 See, for example, Grein v. Grein, 303 Ill. App. 398, 25 N.E. (2d) 409 (1940).

11 In fact, it was the only case cited by the majority.

12 See cases listed in note 8, ante.

13 317 U. S. 287 at —, 63 S.Ct. 207, 87 L. Ed. (adv.) 189 at 192.

14 181 U. S. 175, 21 S.Ct. 551, 45 L. Ed. 804 (1901). See also Thormann v. Frame, 176 U. S. 350, 20 S.Ct. 446, 44 L. Ed. 500 (1900).

the local court was free to conduct its own investigation of the jurisdictional facts and it was careful, in the Williams case, to avoid any imputation that such decision was overruled.[15] In fact, when considering the nature of a divorce proceeding, the court said: "Such a suit, however, is not a mere in personam action. Domicile of the plaintiff, immaterial in a personal action, is . . . essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has been neither personally served nor entered an appearance."[16] So strongly did the court seem to feel on this point that it also stated: "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the finding of the Nevada court, North Carolina finds that no bona fide domicile was acquired in Nevada."[17] Certainly, then, the Williams case affords no true basis for so drastic a departure from precedent.

The majority of the court in the Stephens case appears to have been blinded by the general statement that a judgment which is binding where rendered is equally binding in every other state[18] by reason of the "full faith and credit" clause of the federal constitution.[19] No court, however, has ever deemed itself precluded from determing whether, in fact, the foreign judgment was "binding where renderd,"[20] and there is nothing in the constitutional mandate which forbids such inquiry. It is only the valid judgment to which full faith and credit must be given, and no state court should, by its self-serving declaration that jurisdiction was obtained, be able to bind the courts of the sister states to enforce that which is invalid. Since invalidity may not clearly appear, inquiry into that fact becomes not only necessary but vitally important in order that the true purpose of the "full faith and credit" clause may be vindicated. If the Nevada decree in the Stephens case was fraudulently obtained on a false claim of domicile, neither constitutional requirement nor anything said by the United States Supreme Court requires an Illinois court to stultify itself by giving recognition thereto without even an inquiry into the facts. The Williams case does not so require and, unless the courts of this state wish to extend the doctrine thereof beyond its present scope and to abandon their own prior holdings, the decision of the lower court in the Stephens case should have been affirmed.

W. F. ZACHARIAS

15 Such was also the view of the dissenting judge in Stephens v. Stephens. See 319 Ill. App. 292 at 298, 49 N.E. (2d) 560 at 562.

16 317 U. S. 287 at —, 63 S.Ct. 207, 87 L. Ed. (adv.) 189 at 195.

17 317 U. S. 287 at—, 63 S.Ct. 207, 87 L. Ed. (adv.) 189 at 197.

18 See concurring opinion of Mr. Justice Frankfurter in Williams v. North Carolina, 317 U. S. 287 at —, 63 S.Ct. 207, 87 L. Ed. (adv.) 189 at 199.

19 U. S. Const., Art. IV, § 1.

20 In general, see Restatement, Conflict of Laws §§ 429, 430 and 112.

CIVIL PRACTICE ACT CASES

ATTACHMENT AND GARNISHMENT—PERSONS AND PROPERTY SUBJECT TO ATTACHMENT AND GARNISHMENT—WHETHER OR NOT ATTACHMENT AND GARNISHMENT MAY BE MAINTAINED IN ILLINOIS UPON EQUITABLE CLAIMS NOT YET REDUCED TO JUDGMENT OR DECREE—In *Dunham* v. *Kauffman*,[1] the lessor's successor filed a complaint in chancery against certain non-resident legatees of the deceased lessee to recover rent and taxes which had accrued under the terms of the lease after the administration of the estate of the deceased lessee. The purpose of the action was to subject the assets received by the defendants, as such legatees, to the claim for the unpaid rent and taxes. Four days after the suit was begun, plaintiff filed an affidavit for attachment and the writ was served on the trustees under the last will and testament of the deceased lessee. They answered the plaintiff's interrogatories by stating that they held certain assets in trust upon certain contingencies which had not yet occurred, but that they also possessed a specified sum of accumulated income due to the defendants as beneficiaries of the trust. The trustees prayed the direction of the court as to whether the attachment was proper or not. The trial court, finding that no judgment had been rendered upon the major claim against the legatees, directed the trustees to pay said sum to the beneficiaries and thereby, in effect, quashed the garnishment proceedings. Upon plaintiff's appeal, the Illinois Appellate Court for the First District reversed the decision and held that attachment or garnishment would lie in an original proceeding in equity even though the claim of the plaintiff was based on a money demand and had not been reduced to judgment.

The early Illinois cases consistently announced the proposition that an equitable attachment proceeding could not be maintained, and that rendition of a final judgment and return of execution unsatisfied was essential before the creditor could appeal for equitable relief, since without these, he had failed to establish the inadequacy of his legal remedy.[2] This was so, even though the only asset of the debtor consisted of an equitable estate not subject to ordinary execution.[3] Of course, after an equitable claim had been established by decree, attachment

1 319 Ill. App. 229, 48 N.E. (2d) 777 (1943). Matchett, P. J., wrote a dissenting opinion relying partly on the fact that recognition of equitable attachments amounted to judicial legislation, and partly on the ground that no final appealable order had been entered.

2 Miller v. Davidson, 8 Ill. (3 Gil.) 518 (1846); Phelps v. Foster, 18 Ill. 309 (1857).

3 See, for example, Birney v. Solomon, 348 Ill. 410, 181 N.E. 318 (1932); Ladd v. Judson, 174 Ill. 344, 51 N.E. 838 (1898); Lewis v. West Side Trust & Savings Bank, 288 Ill. App. 271, 6 N.E. (2d) 481 (1937); Pearson v. Tucson Farms Co., 204 Ill. App. 276 (1917). In Brockway v. Kizer, 122 Ill. App. 567 (1905), the court held that the allegation that plaintiff had no remedy at law was insufficient unless supported by the further allegation that the claim had been reduced to judgment which remained unsatisfied.

and garnishment proceedings were available to enforce collection of the money award therein found to be due.[4] An exception has been developed in cases where the complainant showed that his demand was of such character that it could only be established in an equitable proceeding, as in cases of trusts and the like,[5] and requires immediate protection to remove the fund from abuse.[6] It does not, however, extend to cases where unsecured creditors seek to have equitable assets sequestered pending an accounting,[7] or where, in a case like the present one, the plaintiff's demand is a simple money one but which must be litigated in equity in order to reach assets in the hands of legatees after administration has been completed.[8]

The remedy originally provided by the Attachments Act[9] was intended to apply in cases where the plaintiff's demand was actionable in law as by way of assumpsit, debt, covenant, trespass, or trespass on the case.[10] Such statutory remedy could hardly have been applicable to equitable claims, but in 1935 the legislature amended the statute by deleting such limitation, and substituted in lieu thereof the words: ". . . a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor. . . ."[11] At the same time, the practice provisions were amended to conform the procedure in attachment cases as nearly as possible to those controlling other civil actions.[12] Though not expressly providing for the use of attachment in equitable cases, a liberal construction of the amended statute would permit the inference that the remedy provided thereby has been expanded to cover such cases since the controlling test of the right to attach appears to be simply that the creditor must have "a money claim." Though most such claims will be actionable at law, some money claims must, as in the instant case, be presented in equity.

It might be argued that, as the Attachments Act is in derogation of the common law, it should be strictly construed so as to permit no im-

4 Farnsworth v. Strasler, 12 Ill. 482 (1851); Weightman v. Hatch, 17 Ill. 281 (1855). See also Getzler v. Saroni, 18 Ill. 511 (1857).

5 Ladd v. Judson, 174 Ill. 344, 51 N.E. 838 (1898); Dormueil v. Ward, 108 Ill. 216 (1883); Pearson v. Tucson Farms Co., 204 Ill. App. 276 (1917). The case of Gore v. Kramer, 117 Ill. 176, 7 N.E. 504 (1886), contains an intimation along the same line.

6 Miller v. Davidson, 8 Ill. (3 Gil.) 518 (1846).

7 Pearson v. Tucson Farms Co., 204 Ill. App. 276 (1917).

8 Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 N.E. 1050 (1913).

9 Ill. Rev. Stat. 1941, Ch. 11.

10 Originally limited by R.S. 1845, p. 70, § 30, to actions of "debt, covenant or trespass, or on the case upon promises," the use of attachment was enlarged, in 1893, to cover "assumpsit, debt, covenant, trespass, or trespass on the case." See Laws, 1893, p. 74, § 1. As so amended, the statute stood unchanged until the revision in 1935.

11 Laws, 1935, p. 210, Ill. Rev. Stat. 1943, Ch. 11, § 1.

12 Ill. Rev. Stat. 1943, Ch. 11, § 26.

plications other than those essential to effectuate the legislative intent. Cases do exist in which such views have been expressed, but all such cases involve jurisdictional points hence warrant that attitude.[13] When the jurisdictional elements have been satisfied, the act has been given liberal interpretation,[14] and though there has been no complete fusion between law and equity in Illinois,[15] there is no sound reason for permitting attachment in one type of remedy and denying it in another. It has been granted on equitable claims in other jurisdictions,[16] and, if the decision in the instant case should stand, it is now made available in such cases in Illinois.

J. J. BUECHEL

GARNISHMENT—EXTENT OF LIABILITY OF INSURER—WHETHER OR NOT LIABILITY OF INSURER UNDER POLICY IS AFFECTED BY PENDENCY OF APPEAL FROM JUDGMENT AGAINST THE INSURED — A judgment had been rendered in favor of plaintiff, as administrator, for the wrongful death of his decedent. The judgment debtor appealed therefrom, but failed to file a supersedeas bond. During the pendency of such appeal, the plaintiff instituted a garnishment action against an insurance company to reach the proceeds of an automobile liability policy which it had issued to the judgment debtor's father.[1] Although informed that an appeal on the major judgment was still pending, the trial court entered judgment against the insurance company garnishee to the full extent of the policy limits. On appeal therefrom, the judgment was reversed in *Ancateau, for Use of Trust Company of Chicago* v. *Commercial Casualty Insurance Company*[2] on the ground that the garnishment action was premature since the insured's liability had not been "finally determined" within the meaning of language contained in the policy.[3]

13 Rabbitt v. Frank C. Weber & Co., 297 Ill. 491, 130 N.E. 787 (1921); Haywood v. Collins, 60 Ill. 328 (1871); Dennison v. Blumenthal, 37 Ill. App. 385 (1890).

14 Luton v. Hoehn, 72 Ill. 81 (1874); Weightman v. Hatch, 17 Ill. 281 (1855).

15 Frank v. Salomon, 376 Ill. 439, 34 N.E. (2d) 424 (1941), noted in 19 CHICAGO-KENT LAW REVIEW 372.

16 In California, under a statute permitting attachment on claims arising out of contract "express or implied," in the case of Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780 (1919); in Tennessee, under a statute expressly sanctioning such process, in New York Casualty Co. v. Lawson, 160 Tenn. 329, 24 S.W. (2d) 881 (1930); and in Washington, absent any specific statute, in State v. Superior Court, 115 Wash. 359, 197 P. 321 (1921).

1 Suit on the policy was maintained on the theory that it covered the liability of the judgment debtor as an additional person insured thereby. The insurance company had defended the wrongful death action under a non-waiver agreement more commonly known as a "reservation of rights" agreement. It was probably for this reason that the company did not supply the appeal bond which, if it had been presented, would have prevented the litigation in the instant case.

2 318 Ill. App. 553, 48 N.E. (2d) 440 (1943). Disposition of the appeal in the action for wrongful death may be found in Trust Co. of Chicago v. Ancateau, 317 Ill. App. 186, 46 N.E. (2d) 125 (1943).

3 The policy contained the standard clause in current form adopted by the National Bureau of Casualty and Surety Underwriters, prepared by the Insurance Section of the American Bar Association, which reads: "No action shall lie

While an appeal from a judgment, according to the Illinois Civil Practice Act, is a "continuation of the proceeding in the court below,"[4] the fact that an appeal is pending does not deprive the trial court of the right to enforce its judgment by execution unless a bond has been filed and approved in accordance with Section 82 thereof,[5] in which case the appeal operates as a supersedeas. In so far as the judgment debtor in the instant case was concerned, the trial court was entitled to attempt the collection of the original judgment from his property since no bond had been supplied as required by statute.[6] Had third persons acquired rights as purchasers at execution sale thereunder, they would have been protected by Section 76 of the Civil Practice Act.[7] So far as the judgment debtor and such purchasers are concerned, then, the judgment must be regarded as final, even though, in fact, an appeal be pending and the judgment be later reversed.

Involved in the instant case, however, is the problem of whether or not such judgment is final so far as a garnishee is concerned. In this respect the court stated that the question was one "seemingly of first impression in this State,"[8] but came to the conclusion that before garnishment would lie, the judgment must be such that either no action has been taken to review the same, or the parties no longer have the right to the review thereof. It is fundamental that, to support garnishment, the creditor must have secured a judgment against the debtor.[9] If such judgment be vacated, the uncompleted garnishment proceedings will collapse therewith,[10] and if such judgment has become no longer enforcible, as by lapse of time, it will not serve as the foundation for a garnishment action.[11] The same result will be achieved if the major judgment be void.[12] But the only requirements for garnishment imposed by statute are that "a judgment shall be rendered" by a court of record, and that execution thereon shall be returned "no property found."[13] It would seem, therefore, as if the court, by its decision in the instant case, is imposing an additional requirement to the maintenance of garnishment proceedings, to-wit: that the judgment be a "final" one in the ultimate sense of that term.

Such requirement has, apparently, been imposed by the decisions of

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against the company unless as a condition precedent thereto . . . the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after an actual trial or by the written agreement of the Insured, the claimant and the company."

4 Ill. Rev. Stat. 1943, Ch. 110, § 198(1).

5 Ill. Rev. Stat. 1943, Ch. 110, § 206.

6 318 Ill. App. 553 at 556, 48 N.E. (2d) 440 at 442.

7 Ill. Rev. Stat. 1943, Ch. 110, § 200(1).

8 318 Ill. App. 553 at 559, 48 N.E. (2d) 440 at 443.

9 Ill. Rev. Stat. 1943, Ch. 62, § 1. See also First Nat. Bank v. Hahnemann Institutions, 356 Ill. 366, 190 N.E. 707 (1934).

10 Am. Exchange Nat. Bank v. Moxley, 50 Ill. App. 314 (1893); Genden v. Bailen, 275 Ill. App. 382 (1934).

11 Pierce v. Wade, 19 Ill. App. 185 (1885).

12 Kirk v. Elmer H. Dearth Agency, 171 Ill. 207, 49 N.E. 413 (1897); Pierce v. Carleton, 12 Ill. 358 (1851).

13 Ill. Rev. Stat. 1943, Ch. 62, § 1.

other states on the theory that an appeal deprives the judgment of its finality so as to leave the creditor as though possessed of but a simple claim in contract or tort.[14] Examination of such cases, however, discloses either that the judgment debtor had furnished an appeal bond so as to make the appeal operate as a supersedeas,[15] or, at least, that the record was silent on the point.[16] In only one case does it affirmatively appear that no bond had been supplied,[17] though the California court therein did apply the rule achieved by the instant case. Such slender support tends to cast some doubt on the wisdom of the holding in the instant case if it serves to create an additional requirement for garnishment actions.

The outcome of the case could have been more readily supported had the court concluded that the garnishment action was premature because, as between judgment debtor and garnishee, the latter was not then "indebted" to the judgment debtor within the meaning of the Garnishment Act. It is fundamental that, in order for indebtedness to be subject to garnishment, it must be owing without uncertainty or contingency.[18] In the instant case, the insurance company's obligation was to pay only when "the amount of the insured's obligation shall have been finally determined by judgment . . . after actual trial or by written agreement." Until either of these eventualities, no debt had arisen. In that regard the case of *Roberts* v. *Central Mutual Insurance Company*[19] is significant and may well raise a question as to whether or not the instant case is one of first impression. The facts therein were much the same as in the instant case, except that the suit against the insurance company was based on a bond furnished by a cab company, pursuant to statute, given to indemnify successful plaintiffs securing final judgments against it for personal injuries sustained. The phrase "final judgment" as used in the bond and in the statute was held to mean a judgment which the parties no longer had a right to have reviewed rather than one on which an appeal would lie. The court therein pointed out that any other construction would result in absurdity, since "if the court of review should reverse the judgment on the grounds no liability was shown, then the action on the bond would likewise fail and yet as in this case, the defendant would be put to the necessity of preventing the judgment on the bond from becoming final during the pendency of the appeal in the other case."[20] The action on the bond was, therefore, dismissed as being prematurely brought.

14 Arp v. Blake, 63 Cal. App. 362, 218 P. 773 (1923).

15 Waples-Platter Grocer Co. v. Texas & P. Ry. Co., 95 Tex. 486, 68 S.W. 265, 59 L.R.A. 353 (1902); Kreisle v. Campbell, (Tex. Civ. App.) 32 S.W. 581 (1895).

16 Pacific Gas & Electric Co. v. Nakano, 12 Cal. (2d) 711, 87 P. (2d) 700, 121 A.L.R. 417 (1939); Arp v. Blake, 63 Cal. App. 362, 218 P. 773 (1923).

17 Jennings v. Ward, 114 Cal. App. 536, 300 P. 129 (1931).

18 Capes v. Burgess, 135 Ill. 61, 25 N.E. 1000 (1890); Hanover Fire Ins. Co. v. Connor, 20 Ill. App. 297 (1886).

19 285 Ill. App. 408, 2 N.E. (2d) 132 (1936).

20 285 Ill. App. 408 at 414, 2 N.E. (2d) 132 at 134 (1936).

The same conclusion has been reached in New York,[21] California,[22] and Arkansas,[23] though cases do exist with an apparently contrary holding. In Kentucky, for example, it has been held that garnishment would lie despite the pendency of an appeal on the major judgment, but the decision may be explained on the ground that the insurance company had waived the benefit of the "no action" clause by failing to file an appeal bond required of it by the terms of the policy.[24] An apparently contrary Washington case may be likewise explained on the ground that the policy provisions did not require the final determination made necessary by the wording of the policy in the instant case.[25] It is also interesting to note that where an insurance company has furnished a supersedeas bond to the extent of its liability under the policy, garnishment has been denied while that appeal is pending, despite the fact that the major judgment was in excess of the policy limits.[26] At least a portion thereof was not affected by the supersedeas bond, hence could be said to constitute an indebtedness.

There is no doubt that the rights of the injured party under the

[21] In Schroeder v. Columbia Casualty Co., 213 N.Y.S. 649 (1925), no bond was filed on appeal from the tort judgment, but, in holding the action premature, the court stated: ". . . the 'liability imposed by law,' provided for in the policy, has not yet been fixed, and will not be so fixed until all appeals the defendant sees fit to take have been finally determined." See 213 N.Y.S. 649 at 652.

[22] Jennings v. Ward, 114 Cal. App. 536, 300 P. 129 (1931). The policy therein provided that: "No action shall lie against the company . . . unless brought after the amount of such claim or loss shall have been fixed and rendered certain . . . by final judgment against the Assured after trial of the issue. . . ."

[23] Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S.W. 420 (1897). The policy therein lacked the usual "no action" clause, but provided for payment to the insured of all sums "as the insured may become liable for in damages." No supersedeas bond had been filed when appeal from the tort judgment was taken.

[24] Consolidated Underwriters v. Richards' Adm'r, 276 Ky. 275, 124 S.W. (2d) 54 (1939). The policy provided that: "No action shall lie . . . unless brought after the amount of such claim or loss shall have been fixed . . . by final judgment . . . by the court of last resort after trial of the issue. . . ." But see Tucker v. State Automobile Mut. Ins. Co., 280 Ky. 212, 132 S.W. (2d) 935, 125 A.L.R. 751 (1939), in which the "no action" clause was identical to the one in the instant case. The court made a weak attempt to distinguish the case from that of Consolidated Underwriters v. Richards' Adm'r on the theory of waiver, but they expressly quoted with approval from the case of Roberts v. Central Mutual Ins. Co., 285 Ill. App. 408, 2 N.E. (2d) 132 (1936), and concluded that the terms "final judgment" or "finally determined by judgment" meant a judgment which had become final by expiration of time for appeal or by affirmance on appeal.

[25] Gooschin v. Mercer Casualty Co., 178 Wash. 114, 34 P. (2d) 435 (1934). One judge concurred in the result but stated that he thought it might have been better practice for the trial court to proceed with the hearing and thereafter, instead of entering formal judgment, give the insurance company an opportunity to deposit the money in court to bide the result of the appeal on the major claim or in some other way secure payment in case of affirmance. The case of Materazzi v. Commercial Casualty Ins. Co., 283 N.Y.S. 942 (1935), is explainable on the same basis.

[26] Tucker v. State Automobile Mut. Ins. Co., 280 Ky. 212, 132 S.W. (2d) 935 (1939). Contra: McDermott v. Concord Casualty & Surety Co., 265 N.Y.S. 795 (1933).

policy are no greater than those possessed by the insured.[27] The latter would have been unable, in the instant case, to maintain an action thereon at the time the garnishment proceedings were instituted. Hence it would seem that the court achieved the right result, but should have predicated the same on different grounds.

W. S. GROTEFELD

[27] Ill. Rev. Stat. 1943, Ch. 73, §1000, provides that: ". . . an action may be maintained by the injured person or his or her personal representative against such company under the terms of the policy *and subject to all the conditions thereof*. . . . " Italics added. See also Schneider v. Autoist Mutual Ins. Co., 346 Ill. 137, 178 N.E. 466 (1931); Scott v. Freeport Motor Casualty Co., 310 Ill. App. 421, 34 N.E. (2d) 879 (1941); Schroeder v. Columbia Casualty Co., 213 N.Y.S. 649 (1925). Textual discussion of the point may be found in Appelman, Insurance Law and Practice, Vol. 8, Ch. 201, p. 220.